

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9<sup>th</sup> day of September, two thousand fifteen.

PRESENT: RALPH K. WINTER,  
JOHN M. WALKER, Jr.,  
DENNIS JACOBS,  
Circuit Judges.

- - - - -X

LHAKPA NURU SHERPA,  
Petitioner,

-v.-

14-1272

LORETTA E. LYNCH, UNITED STATES  
ATTORNEY GENERAL,\*  
Respondent.

- - - - -X

FOR PETITIONER: H. RAYMOND FASANO, (with Ramesh  
K. Shrestha on the brief),

---

\* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Loretta E. Lynch is automatically substituted for former Attorney General Eric H. Holder, Jr.

1                   YOUUMAN, MADEO & FASANO, LLP,  
2                   New York, New York.  
3

4       **FOR RESPONDENT:**

                  COLETTE J. WINSTON (with Anthony  
5                   C. Payne on the brief), for  
6                   Joyce R. Branda, Assistant  
7                   Attorney General, Civil  
8                   Division, Washington, District  
9                   of Columbia.

10  
11           **UPON DUE CONSIDERATION** of this petition for review of a  
12   Board of Immigration Appeals ("BIA") decision, it is hereby  
13   **ORDERED, ADJUDGED, and DECREED** that the petition for review  
14   is **DENIED**.  
15

16           Petitioner Lhakpa Nuru Sherpa, a native and citizen of  
17   Nepal, seeks review of a April 3, 2014 decision of the BIA  
18   affirming an October 20, 2011 decision of an Immigration  
19   Judge ("IJ") denying Sherpa's application for asylum,  
20   withholding of removal, and relief under the Convention  
21   Against Torture ("CAT"). We assume the parties' familiarity  
22   with the underlying facts, the procedural history, and the  
23   issues presented for review.  
24

25           When, as here, "the BIA adopts the decision of the IJ  
26   and merely supplements the IJ's decision" this Court  
27   "review[s] the decision of the IJ as supplemented by the  
28   BIA." Chen v. Gonzales, 417 F.3d 268, 271 (2d Cir. 2005).  
29   The applicable standards of review are well established.  
30   See 8 U.S.C. § 1252(b)(4)(B); see also Lin v. Mukasey, 534  
31   F.3d 162, 165-66 (2d Cir. 2008).  
32

33           For asylum applications governed by the REAL ID Act,  
34   such as Sherpa's, the IJ may, considering the totality of  
35   the circumstances, base a credibility finding on an  
36   applicant's demeanor as well as omissions and  
37   inconsistencies in the applicant's testimony without regard  
38   to whether they go "to the heart of the applicant's claim."  
39   8 U.S.C. § 1158(b)(1)(B)(iii); Lin, 534 F.3d at 165. We  
40   "defer . . . to an IJ's credibility determination unless,  
41   from the totality of the circumstances, it is plain that no  
42   reasonable fact-finder could make such an adverse  
43   credibility ruling." Lin, 534 F.3d at 167. And where "the  
44   IJ's adverse credibility finding is based on specific  
45   examples in the record of inconsistent statements by the  
46   asylum applicant about matters material to his claim of  
47   persecution, or on contradictory evidence or inherently

1 improbable testimony regarding such matters, a reviewing  
2 court will generally not be able to conclude that a  
3 reasonable adjudicator was compelled to find otherwise."  
4 Majidi v. Gonzales, 430 F.3d 77, 79-80 (2d Cir. 2005)  
5 (internal quotation marks and citations omitted).  
6 Accordingly, the "exceedingly narrow scope of our review . .  
7 . is designed to ensure merely that credibility findings are  
8 based upon neither a misstatement of the facts in the record  
9 nor bald speculation or caprice." Id. at 80 (internal  
10 quotation marks and citations omitted). Here, the totality  
11 of the circumstances, including Sherpa's demeanor, his  
12 internally inconsistent testimony, and inconsistencies  
13 between his testimony and record evidence, taken together,  
14 sufficiently support the IJ's credibility determination.  
15

16 The IJ's finding that Sherpa's demeanor was somewhat  
17 hesitant, nonresponsive, evasive and rehearsed formed the  
18 basis for the IJ's conclusion that Sherpa did not testify in  
19 a forthright manner. One example cited by the IJ is on  
20 direct examination, when Sherpa was asked when he joined the  
21 Nepali Congress Party, Sherpa paused for a long period of  
22 time and had difficulty answering the question. When  
23 queried as to the hesitancy in his testimony, Sherpa gave  
24 two conflicting explanations, first asserting that there  
25 were no pauses, and then explaining that the hesitations in  
26 his testimony were simply his way of talking. Contrary to  
27 Sherpa's assertion on appeal, the IJ properly assessed  
28 Sherpa's demeanor and supported that finding with a specific  
29 record example. See Lin v. Gonzales, 446 F.3d 395, 400 (2d  
30 Cir. 2006) ("Evasiveness is, of course, one of the many  
31 outward signs a fact-finder may consider in evaluating  
32 demeanor and in making an assessment of credibility.  
33 Demeanor is virtually always evaluated subjectively and  
34 intuitively, and an IJ therefore is accorded great deference  
35 on this score . . . .").  
36

37 The IJ also supported its adverse credibility  
38 determination by citing three inconsistencies in Sherpa's  
39 testimony. On direct examination, Sherpa testified that he  
40 returned from a mountaineering expedition on April 24, 2005  
41 and that he was attacked by the Maoists on June 22, 2005.  
42 Subsequently, on cross-examination, Sherpa conceded that  
43 during the period between April 24 and June 22, he was not  
44 molested by the Maoists. At the conclusion of his  
45 testimony, Sherpa was given the opportunity to rectify any  
46 mistakes in his testimony and at this point, Sherpa  
47 indicated that his return date from his expedition was

1 actually May 30, 2005. The IJ questioned Sherpa as to why  
2 he initially volunteered the date of April 24, 2005 and  
3 Sherpa simply stated that he made a mistake. Because of the  
4 line of questioning on cross-examination pertaining to the  
5 length of time Sherpa was free from danger perpetrated by  
6 the Maoists, the IJ found Sherpa's inconsistent testimony on  
7 this issue to be a "significant discrepancy." Certified  
8 Administrative Record ("CAR") at 96.

9  
10 Similarly, the IJ observed that Sherpa maintained on  
11 direct and cross-examination that his wife received a letter  
12 from the Maoists' sister organization, the Young Communist  
13 League, in November 2009. Once Sherpa was shown a copy of  
14 the letter, dated April 30, 2009, he again simply stated  
15 that he made a mistake and that he was confused, despite  
16 freely volunteering the November 2009 date on both direct  
17 and cross-examination. Sherpa further testified on direct  
18 examination that he joined the Nepali Youth Congress Party  
19 on August 26, 2005 but changed this answer on cross-  
20 examination to indicate that his association with the Nepali  
21 Youth Congress Party actually began in 2000. As with his  
22 previous answers, Sherpa offered nothing by way of  
23 explanation for his discrepancy other than acknowledging  
24 that he made a mistake. Thus, on this record, "the totality  
25 of the circumstances supports the agency's adverse  
26 credibility determination." Yan v. Holder, 578 F. App'x 4,  
27 6 (2d Cir. 2014).

28  
29 Sherpa contends that none of the IJ's findings  
30 pertaining to inconsistencies in dates should be credited  
31 because of the significant differences between the Nepali  
32 and Gregorian calendars. This argument was not made to the  
33 IJ, and the record does not compel the conclusion that the  
34 discrepancies in Sherpa's answers were a result of  
35 incongruity between the two calendars. "Our role does not  
36 extend to hypothesiz[ing] excuses for the inconsistencies in  
37 an asylum applicant's testimony." Majidi, 430 F.3d at 80  
38 (internal quotation marks and citations omitted). Sherpa  
39 has accordingly fallen short of prevailing on his petition.  
40 See id. ("A petitioner must do more than offer a plausible  
41 explanation for his inconsistent statements to secure  
42 relief; he must demonstrate that a reasonable fact-finder  
43 would be *compelled* to credit his testimony.") (internal  
44 quotation marks and citations omitted). The IJ's adverse  
45 credibility finding was therefore sufficient to deny Sherpa  
46 asylum and withholding of removal. See Hoxhallari v.  
47 Gonzales, 468 F.3d 179, 184 (2d Cir. 2006). And Sherpa's

1 CAT claim must be rejected because he has not shown that it  
2 is more likely than not that he would be tortured by or with  
3 the acquiescence of a government official acting in an  
4 official capacity.  
5

6 For the foregoing reasons, the petition for review is  
7 **DENIED**. As we have completed our review, any stay of  
8 removal that the Court previously granted in this petition  
9 is **VACATED**, and any pending motion for a stay of removal in  
10 this petition is **DISMISSED** as moot.  
11

12 FOR THE COURT:  
13 CATHERINE O'HAGAN WOLFE, CLERK  
14